

9/25/06 - (9)

TOWN OF ACTON
BOARD OF SELECTMEN

SITE PLAN SPECIAL PERMIT #02/19/03-388

60 POWDERMILL, ACTON, MASSACHUSETTS

AMENDMENT OF DECISION

By letter dated August 14, 2006, Acton Survey & Engineering, Inc., on behalf of the Applicant Autoplex Realty LLC has requested certain modifications to Site Plan Special Permit No. 02/19/03-388 (the "Permit").

Section 5.12 of the Board of Selectmen's Rules and Regulations for said Plan Special Permits provides the following procedures for amending a Site Plan Special Permit:

A previously granted Permit may be amended by written request to the Board or on the Board's own motion. The Board shall determine whether any request for further alterations to a site constitutes a minor amendment or if such request should be considered a new Application requiring a public hearing. The Board may amend a Permit without a new public hearing provided it finds that the amendment is not significant to the public interest and is consistent with the purpose and intent of the Bylaw

Pursuant to Section 5.12, the Board considered this request at a duly noticed public meeting on September 11, 2006.

Facts

The Board makes the following findings of fact with respect to these requested amendments:

1. By Decision dated June 23, 2003, recorded in the Town Clerk's office on June 24, 2003, the Board of Selectmen issued the Permit subject to certain required plan modifications, conditions and limitations.
2. Among other things, the Permit required the Applicant to provide for "25 parking spaces marked with signs indicating customer or employee parking only" (§ 2.1.1). The Permit provided that there "shall be no further development of this site without written consent of the Board of Selectmen as outlined within the Acton Zoning Bylaw" (§ 4.2). The Permit further provided that (§ 3.1):

Prior to occupancy or use of any new building constituting a part of the project, an as-built plan shall be supplied by the engineer of record certifying that the project was built according to the approved documents. The as-built plan shall show all pavement, building and drainage structure locations above and below grade in their true relationship

to lot lines, and include appropriate grades and elevations. In addition to the engineer of record, said plans shall be certified by a Mass. Registered Land Surveyor.

3. On November 18, 2005, Acton Survey & Engineering, Inc., on behalf of the Applicant requested certain modifications to the Permit.

4. Pursuant to Section 5.12 of the Board of Selectmen's Rules and Regulations for said Plan Special Permits, at a duly noticed public meeting on December 19, 2005, the Board of Selectmen considered the Applicant's requests for modification set forth in Acton Survey's November 18, 2005 letter. The Applicant's principal, Leo Bertolami, attended the meeting, presented the Applicant's request to the Board, and was present for the Board's action on the Applicant's request.

5. The minutes of the Board's December 19, 2005 meeting reflect that the Board unanimously voted to approve the Applicant's requested modifications to the Approved Site Plans, subject to the express condition that the fencing on the north side shall be set back 5 feet from the building and fencing on the north east shall be set back a distance of 1.5 feet from the Conservation Restriction.¹

6. The Applicant has reportedly completed construction on the project. However, based on the Building Commissioner's inspection of the property on September 5, 2006, the following aspects of the work do not conform to the Permit as modified by the Board of Selectmen on December 19, 2005:

- The fence to the north of the building does not conform to the Board's condition of December 19, 2005 for a 5 foot setback from the building.
- The fence to the northeast that does not conform to the Board's condition of December 19, 2005 for a 1.5 foot setback from the boundary of Conservation Restriction.
- Exterior lighting has not been approved or installed as per Finding 1.5 of the Decision
- The Plan provides for vertical curbing around the parking lot and slope granite curbing at the entrance. None of the vertical or sloped curbing has been installed according to the plan.
- The Plan provides for customer/employee signs. None of the signs has been installed.

¹ The tape recording of the Board's meeting confirms that Selectman Magee moved, Selectman Hunter seconded, and the Board voted unanimously to accept site plan as presented, with the modification that the fencing on the northern side of the building, on the north side of the parking lot, follow the building at a 5 foot offset from the building and that the fencing at the northeast side of the subject site be placed at a distance of one and a half feet off the conservation restriction line.

- The landscaping has not been completed according to the approved Plan.
- 58'+/- of guardrail has not been installed along the westerly retaining wall as shown on the approved Plan.
- The final layer of parking lot pavement has not been completed.

7. Accordingly, the project has not been built in compliance with the Permit as amended, and the Applicant's engineer cannot comply with the requirement to submit "an as-built plan... certifying that the project was built according to the approved documents" (Permit § 3.1).

8. By letter dated August 14, 2006, Acton Survey & Engineering, Inc., on behalf of the Applicant, the Applicant has therefore requested after-the-fact modifications to the Permit as previously amended as shown on the following plans prepared by Acton Survey & Engineering, Inc. for the 60 Powdermill Road project:

Name of Plan	Date
Red-Lined Landscape Plan	June 1, 2006
Site Plan – Showing Red Line Revisions	November 16, 2005
Site Plan – Showing Re Line Revisions Option 1	December 12, 2005
Easement Plan	June 2003

9. The Red-Lined Landscape Plan dated June 1, 2006 shows a fence to the north of the building that does not conform to the Board's condition of December 19, 2005 for a 5 foot setback from the building.

10. The Red-Lined Landscape Plan dated June 1, 2006 shows a fence to the northeast that does not conform to the Board's condition of December 19, 2005 for a 1.5 foot setback from the boundary of Conservation Restriction.

11. The Conservation Restriction referenced above was granted by the Applicant to the Town by instrument dated July 13, 2004, recorded in the Middlesex South Registry of Deeds at Book 44333, Page 447.

12. At the time the Conservation Restriction was granted, the Applicant represented that the Applicant would be refinancing all outstanding mortgages on the property including the following:

- Mortgage to Citizens Bank of Massachusetts, as successor to Community National Bank of Hudson, Massachusetts recorded in the Middlesex South Registry of Deeds at Book 41471, Page 149 and Book 41471, Page 157.

- Mortgage to Middlesex Savings Bank of Natick, Massachusetts, recorded in the Middlesex South District Registry of Deeds at Book 20202, Page 201.

13. However, the Applicant has apparently never refinanced the mortgages, and the Applicant has never provided a fully executed Subordination, Non-Disturbance and Attornment Agreement pursuant to which the aforesaid mortgagees agree that (a) the mortgages shall be subject to the foregoing Conservation Restriction, (b) the covenants in the Conservation Restriction shall have the same force and effect as though executed and recorded before the grant of the aforesaid mortgages, and (c) the mortgages shall be subordinate to the Conservation Restriction.

Decision and Conditions

Based on the foregoing facts, the Board renders the following decision with respect to the amendments requested by letter dated August 14, 2006, by Acton Survey & Engineering, Inc., on behalf of the Applicant:

1. The Applicant has provided no persuasive justification as to why the improvements were installed in a manner that does not conform to the Permit and the Board's condition of December 19, 2005, of which the Applicant was personally aware based on his attendance at the December 19, 2005 meeting.
2. Prior to occupancy or use of any new building constituting a part of the project, the work shall be made to conform to the Permit as modified by the Board of Selectmen on December 19, 2005.
3. Without limitation, the fence to the north of the building shall be made to conform to the Board's condition of December 19, 2005 for a 5 foot setback from the building.
4. Further without limitation, the fence to the northeast shall be made to conform to the Board's condition of December 19, 2005 for a 1.5 foot setback from the boundary of Conservation Restriction.
5. Further without limitation, exterior lighting shall be installed as per Finding 1.5 of the Decision.
6. Further without limitation, vertical curbing around the parking lot and slope granite curbing at the entrance shall be installed.
7. Further without limitation, the required customer/employee signs shall be installed.
8. Further without limitation, the landscaping shall be completed according to the approved Plan.

9. Further without limitation, 58' +/- of guardrail shall be installed along the westerly retaining wall as shown on the approved Plan.
10. Further without limitation, the final layer of parking lot pavement shall be completed.
11. Prior to occupancy or use of any new building constituting a part of the project, the Applicant shall execute and shall cause all mortgagees with any outstanding recorded interest in the property covered by the Conservations Restriction to execute, and the Applicant shall deliver to the Building Commissioner a fully executed Subordination, Non-Disturbance and Attornment Agreement (in a form reasonably acceptable to counsel for the Applicant, the Town and the Mortgagee(s)) pursuant to which each such mortgagee shall agree that (a) its mortgage(s) shall be subject to the foregoing Conservation Restriction, (b) the covenants in the Conservation Restriction shall have the same force and effect as though executed and recorded before the grant of the aforesaid mortgages, and (c) its mortgage(s) shall be subordinate to the Conservation Restriction.
12. Prior to occupancy or use of any new building constituting a part of the project, the Applicant shall deliver to the Building Commissioner an as built plan from the Applicant's engineer of record certifying that the project has been built in accordance with the Permit as amended by the Board's vote of December 19, 2005 and as set forth herein. The as built plan shall show all pavement, building and drainage structure locations above and below grade in their true relationship to lot lines, and include appropriate grades and elevations. In addition to the engineer of record, said plans shall be certified by a Mass. Registered Land Surveyor.
13. Upon completion of the work required by the foregoing conditions, upon the delivery to the Building Commissioner the fully executed Subordination, Non-Disturbance and Attornment Agreement, and upon delivery to the Building Commissioner of the required as built plan, and upon compliance with all applicable laws, bylaws, rules and regulations, the Building Commissioner may issue an occupancy permit for the project.
14. All other relief requested by the Applicant shall be and hereby is denied.

15. Except to the extent specifically modified as set forth herein, the Permit shall remain in full force and effect.

THE TOWN OF ACTON,

By and through the
Acton Board of Selectmen,

Walter M. Foster, Chairman

F. Dore' Hunter

Lauren S. Rosenzweig

Peter K. Ashton

Andrew D. Magee